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In the

Supreme Court of the United States

October Term, 1982

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., and ELKHART BRASS MANUFACTURING CO., INC.,

Petitioners,

vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, and DR. EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1. Should the "zone of interests" limitation on standing be applied to foreclose judicial review of agency action where such action is arguably detrimental to the general health, safety and welfare?
2. If the "zone" test is applicable to this class of cases, did the Court below err in applying it to the interests sought to be protected in this case?

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vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, and DR. EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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The Fire Equipment Manufacturers' Association, Inc. and Elkhart Brass Manufacturing Co., Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (App. A, *infra*, 1a-7a) was issued on May 27, 1982, and is reported at 679 F.2d 679.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 27, 1982. (App. B, *infra*, 8a). A timely request for rehearing and suggestion for rehearing in banc was denied on July 22, 1982. (App. C, *infra*, 9a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains all the names of the parties to the proceeding in the court whose judgment is sought to be reviewed except:

1. The Ansul Company, petitioner in the Court below.
2. Motor Vehicle Manufacturers Association of the United States, Inc., *amicus curiae* in support of respondent agency in the Court below.
3. Organizational Resources Counselors, Inc., *amicus curiae* in support of respondent agency in the Court below.

STATUTE INVOLVED

This petition involves a construction of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651 *et. seq.* and specifically Section 6(f) thereof which in pertinent part provides:

> "Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. . . . The determinations

of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. §655(f).

Excerpts of other relevant statutes are set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

The Fire Equipment Manufacturers' Association, Inc. ("FEMA") is a trade association with a membership comprised of manufacturers of portable fire extinguishers and other fire-fighting equipment used in workplaces regulated by the Occupational Safety and Health Administration ("OSHA"). Elkhart Brass Manufacturing Co., Inc. ("Elkhart") is a manufacturer of fire-fighting equipment and a member of FEMA. (App. A, *infra*, 2a).

On September 12, 1980, OSHA amended the entire Subpart L, Fire Protection, 29 CFR Part 1910 (45 *FR* 60656) which contains occupational safety and health standards applicable to all employers under the Occupational Safety and Health Act of 1970 ("Act"). The amended standards specify the workplace fire protection measures required by all employers.

On October 30, 1980, petitioners filed a timely petition for judicial review, challenging certain portions of the amended standard. The jurisdiction of the Court of Appeals is based on Section 6(f) of the Act, 29 U.S.C. §655(f), which authorizes judicial review of OSHA standards in the court of appeals. Petitioners challenge the following changes made in the amended OSHA standards:

1. The amended OSHA standard now permits an employer to remove previously required portable

fire extinguishers from the workplace if instead a written evacuation plan is instituted. (App. A, *infra*, 2a).

2. The amended OSHA standard now permits employers to use ⅝ inch diameter garden-type hose in lieu of 1-½ inch fire hose or fire extinguishers as part of workplace fire safety equipment. (App. A, *infra*, 2a).

The basis for petitioners' challenge is that OSHA failed to give adequate notice in the rulemaking proceedings; that the amended standard is not "reasonably necessary or appropriate" to provide a safe workplace as is required by sections 2(b)(3) and 3(8) of the Act (App. D, *infra*, 10a); that the amended standard differs impermissably from existing national consensus standards of the National Fire Protection Association in violation of section 6(b)(8) of the Act (App. D, *infra*, 11a); and that the amended standard is not supported by substantial evidence in the rulemaking record considered as a whole[1] as is required in section 6(f) of the Act. (App. A, *infra*, 2a).

The danger this amended standard posed to employees was emphasized by Schirmer Engineering Corp., OSHA's own independent expert fire consultant. In its lengthy

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[1] Even OSHA concedes that "there is a need for employees to fight fires in the workplace, especially where no public fire protection service is available or where available service is inadequate." 45 *FR* 60659, col. 1. Yet incredibly the agency then permits employers to eliminate fire extinguishers from the workplace, even though employees using this equipment have extinguished *94.2 percent* of workplace fires without assistance from a public fire department. 45 *FR* 60657, col. 3.

report, Schirmer Engineering warned OSHA of the "potential hazard to employee safety if portable fire extinguishers were not provided in the workplace," and that the amended standard would "jeopardize the safety and evacuation of employees" and could "contribute to employee injury" during evacuation. The Schirmer Report is part of the rulemaking record. (Ex. 8:97)

Numerous other commenters to the amended standard expressed similar criticism and concern. If anything there was substantial evidence in the record *opposing* the amended standard. OSHA should not have ignored these expert, unbiased warnings.

Petitioners drew these defects to the attention of the Court below, and we contend that Congress intended and the general health, safety and welfare of the millions of employees in this Nation requires a ruling on the merits.

However, the Court below never reached the merits of these arguments "because we have determined that petitioners lacked standing" under the two-part test[2] announced by this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970). (App. A, *infra*, 2a). Although petitioners suffered injury-in-fact as a result of OSHA's action (App. A, *infra* 3a), the Court below ruled that petitioners failed to satisfy the "zone of interests" test.

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[2] "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.*, 397 U.S. at 152. The second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, 397 U.S. at 153.

Accordingly, the Court concluded that "the petition must be dismissed for lack of standing." (App. A, *infra* 7a).

Petitioners file this petition for a writ of certiorari to resolve the important issue of whether the "zone of interests" test is applicable to a case involving judicial review of agency action which is arguably detrimental to the general health, safety or welfare.[3] We submit that it is not.

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[3] This case involves agency action which is arguably detrimental to the general health, safety and welfare of this Nation's employees. If judicial review of the amended standard at issue herein is not afforded, the standard is immune from challenge since the 60 day limitation period for review under section 6(f) has expired. See notes 19 and 21, *infra*.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Court Below Conflicts With The Law Of This Court Concerning The Class Of Cases To Which The "Zone Of Interests" Test Applies.

Any petitioner who seeks to challenge agency action must meet the Article III minima of injury-in-fact.[4] However, the "zone of interests" test has no application so as to foreclose judicial review of agency action which is arguably detrimental to the general health, safety or welfare at the instance of a petitioner injured-in-fact.

In the present case petitioners satisfy the injury-in-fact requirement (App. A, *infra*, 3a), and we assert that OSHA's amended regulation impairs the health and safety of this Nation's approximately 62 million employees from workplace fires. (App. A, *infra*, 2a, 3a, 5a). This case involves agency action arguably detrimental to the general health, safety or welfare[5] to which the Court below erroneously applied the "zone" test.

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[4] Article III requires the plaintiff to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, that the injury fairly can be traced to the challenged action and is likely to be redressed if the requested relief is granted. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99-100 (1978); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

[5] See note 1, *supra*.

This limitation on the application of the "zone" test is based on the decisions of this Court, five in number[6], in which the test was announced and has been applied. The common theme running through all these decisions is a petitioner who is requesting judicial review of agency action or legislative pronouncement which increases the petitioner's competition[7] or is otherwise adverse to petitioner's business[8], but is not *in addition* arguably detrimental to the general health, safety or welfare. As this Court expressly stated in *Data Processing* wherein the "zone" test was fashioned: "The present [case] is a *competitor's* suit." *Id.*, 397 U.S. at 152 (Emphasis in original).

This proposition also flows from the rationale expressed in *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), discussed *infra* at p. 13, grant-

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[6] *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153-156 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 164-165 (1970); *Arnold Tours, Inc.* v. *Camp*, 397 U.S. 315 (1970) (per curiam); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620-621 (1971); *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320-321 n.3 (1977).

[7] In *Data Processing*, *Arnold Tours* and *Investment Co. Inst.*, petitioners challenged rulings by the Comptroller of the Currency that would have allowed national banks for the first time to compete with petitioners in the sale of data processing services, travel services and investment services respectively.

[8] In *Barlow*, tenant farmers challenged a ruling by the Secretary of Agriculture which could have lessened their economic independence from their landlords and adversely affected their farming business. In *Boston Stock Exchange*, out of state stock exchanges challenged a New York securities transaction tax which could divert business from its facilities to the New York exchanges.

ing standing where the public interest demands a hearing at the instance of a person injured-in-fact by agency action.

The "zone" test was first announced in *Association of Data Processing Service Organizations* v. *Camp, supra.* There businesses which sold data processing services and their association challenged a ruling by the Comptroller of the Currency that national banks, as an incident to their banking services, may sell data processing services to other banks and bank customers. Petitioners feared new competition from national banks in the sales of these services. In a nonstatutory review case brought under section 10 of the Administrative Procedure Act[*], they argued that the Comptroller's ruling violated the National Bank Act.

Justice Douglas then set forth the two-part test by which this Court would determine the issue of standing *in such a case*: "The first question is whether the plaintiff

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[*] A nonstatutory review case is one where judicial review of agency action taken pursuant to a specific statute is not authorized by Congress within such statute, but is rather based on section 10 of the Administrative Procedure Act, 5 U.S.C. §702. (App. D, *infra*, 10a)

By contrast, a statutory review case is one where judicial review of agency action taken pursuant to a specific statute is authorized by Congress is that statute itself. *E.g., Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. at 100. Courts often confuse the two cases when deciding the standing issue. Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 Harv.L.Rev. 645, 667-668 and nn. 104-108 (1973).

No decision of this Court has applied the "zone" test to a statutory review case. The present case is a statutory review case to which, petitioners maintain, the "zone" test is not applicable.

alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.*, 397 U.S. at 152. The second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, 397 U.S. at 153.

Subsequent decisions of this Court which applied the "zone" test are summarized below. Not one case involves a petitioner's challenge to agency action which is arguably detrimental to the general health, safety or welfare.

1. *Barlow* v. *Collins*, 397 U.S. 159 (1970). This was the companion case to *Data Processing*. Here tenant farmers challenged an amended regulation issued by the Secretary of Agriculture under the Food and Agriculture Act of 1965 which permitted tenant farmers to assign their government payments under the upland cotton program to secure their payment of cash rent for the land. Under the prior regulation such assignments were prohibited. Petitioners feared demands for such assignments from landlords which could be ruinous to their farming business and reduce their economic independence from the landlord. In a nonstatutory review case, they argued that the Secretary's action violated the Food and Agriculture Act of 1965. This Court upheld petitioners' standing under the *Data Processing* two-part test.

2. *Arnold Tours, Inc.* v. *Camp*, 397 U.S. 315 (1970) per curiam). Here travel agents challenged a ruling by the Comptroller of the Currency that authorized national banks to provide travel services for their customers. Petitioners feared new competition from national

banks in the sale of these services. In a nonstatutory review case, they argued that the Comptroller's action violated the National Bank Act. This Court upheld petitioners' standing under the *Data Processing* two-part test.

3. *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971). Here several open-end investment companies and their association challenged a regulation promulgated by the Comptroller of the Currency which purportedly authorized national banks to operate collective investment funds. Petitioners feared new competition to their open-end mutual funds from national banks in the sales of investment services. In a nonstatutory review case, they argued that the Comptroller's action violated the Glass-Steagall Act of 1933. This Court upheld petitioners' standing under the *Data Processing* two-part test.

4. *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977). Here several out-of-state stock exchanges challenged a New York securities transaction tax which imposed a greater burden on out-of-state sales than on transactions of the same magnitude involving in-state sales. Petitioners feared that the discriminatory transfer tax would be anti-competitive, diverting business from their facilities to exchanges in New York. The state court upheld the tax as constitutional. The exchanges appealed to this Court, asserting that the tax discriminated against their business in violation of the Commerce Clause. This Court upheld the exchanges' standing under the *Data Processing* two-part test.

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No other decisions of this Court have applied the "zone" test to decide the issue of standing, though the

test has been recited as *dictum* on several occasions.[10]

Moreover, since 1970 this Court has decided a number of standing cases without even a mention of the "zone" test although arguably its application could have yielded a different result. *See, e.g., Bryant* v. *Yellen,* 447 U.S. 352, 366-368 (1980); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. at 79; *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 62-63 (1976); see also K. Davis, *Administrative Law Treatise* §22.02-11, at 348-351 (Supp. 1982).[11]

This Court's virtual non-use of the "zone" test since its formulation suggests its demise.[12] If it is still alive its idleness strongly suggests this Court's intent that the test have the *narrow* application found in the five cases where it has been used, not a *broad* application to every request for judicial review of agency action.

Any doubt as to the inapplicability of the "zone" test to review of government action which is arguably detrimental to the general health, safety or welfare was laid

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[10] *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. at 100; *Rakas* v. *Illinois,* 439 U.S. 128, 139-140 (1978); *Singleton* v. *Wulff,* 428 U.S. 106, 112 (1976); *United States* v. *SCRAP,* 412 U.S. 669, 686, n.13 (1973).

[11] According to Professor Davis, "at least 25 Supreme Court opinions on standing since 1970 do not mention the 'zone' test even though it could be relevant to most of the opinions." *Administrative Law Treatise* §22.02-11, at 347 (Supp. 1982).

[12] Professor Davis' assessment: "The probability is that the Court has tacitly adopted the Brennan-White dissenting view in *Data Processing* that the sole test for standing should be 'injury-in-fact.'" *Administrative Law Treatise* §22.02-11, at 351 (Supp. 1982).

to rest in this Court's decision in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra.* There the Court upheld standing for petitioners to challenge the constitutionality of the Price-Anderson Act, which limited nuclear power plant liability for a disaster. Petitioners argued with force and logic that the limited liability could lessen a company's concern for the health and safety of people living near the facilities. This Court then stated a two-prong test for standing, with no mention of the "zone" test:

> "We . . . cannot accept the contention that, outside the context of taxpayer's suits, a litigant must demonstrate anything more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Article III." *Id.*, 438 U.S. at 79.

Similarly, the rationale of *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970) is applicable to cases such as this one where the challenged agency action is arguably detrimental to the general health, safety or welfare. In *Scanwell* a disappointed bidder challenged the Federal Aviation Association's award of a contract for instrument landing systems to be installed at airports to another contractor. Such systems are designed to make the approach of aircraft to airports *safer* for users of both. The FAA sought assurances on the safety of these systems by requiring that to qualify a prospective landing system (1) Must have been installed in at least one airport, and (2) Must have a certificate of safe performance based on an FAA flight check. *Id.,* 424 F.2d at 860 and n.1.

The FAA, however, awarded the contract to a bidder whose landing system had never been installed in an

airport, nor did it have the certificate of safe performance based on an FAA flight check. Petitioner challenged the unauthorized FAA action as a person "adversely affected or aggrieved by agency action" under section 10 of the Administrative Procedure Act, 5 U.S.C. §702.

Under the circumstances in *Scanwell*, the Court granted standing based upon injury-in-fact *alone*. For not only will persons "vindicate their very real interests," but also in such a case "the suit itself is brought in the *public interest* by one acting as a 'private attorney general'." *Id.*, 424 F.2d at 864 (Emphasis added).

The rationale in *Scanwell* of granting standing for bidders "in cases where the public interest demands a hearing," as the Seventh Circuit observed in *Peoples Gas, Light & Coke Co.* v. *U.S. Postal Service*, 658 F.2d 1182, 1193 n. 7 (7th Cir. 1981),[13] applies with equal force to this case. OSHA's action threatens the general health and safety of employees under its protection, just as surely as the FAA's decision to install a potentially unsafe landing system in airports threatened those persons under its protection.

In the past 12 years this Court's "zone" test has drawn substantial criticism, and bred confusion and divergent approaches among the lower federal courts. Each point is discussed below. The resultant confusion of the lower

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[13] The Seventh Circuit follows the *Scanwell* rule. *Airco, Inc.* v. *Energy Research & Development Administration*, 528 F.2d 1294, 1296 (7th Cir. 1975), and *Rossetti Contracting Co., Inc.* v. *Brennan*, 508 F.2d 1039, 1042 (7th Cir. 1974). Other federal circuits have also followed the *Scanwell* rationale. *William F. Wilke, Inc.* v. *Department of the Army*, 485 F.2d 180, 182-183 (4th Cir. 1973); *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972).

courts is due to the lack of guidance from this Court as to whether the "zone" test is still the law; and, if so, to what types of cases is it to be applied?

A. Criticism Of The "Zone" Test Has Been Substantial.

Even as it was announced, the "zone" test drew sharp criticism from Justice Brennan who, joined by Justice White, concurred in the results of *Data Processing* and *Barlow* and dissented. Justice Brennan would have held that injury-in-fact was the only requirement for standing, and that the "zone" test was "wholly unnecessary and inappropriate" to determine standing. *Barlow* v. *Collins*, 397 U.S. at 168, 169 (Brennan, J., concurring and dissenting). The "zone" test confusingly implicates reviewability and the merits of the case:

> "The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing. Today's decisions, however, will only *compound present confusion and breed even more litigation over standing.*" *Id.* at 176. (Emphasis added).

Justice Brennan then made a predication, one that has, unfortunately, come to pass in this case and others[11]:

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[11] "The majority's blind adherence to the zone of interest test fails to consider the nature and purpose of the rule" and "the harm is not limited to this case. Such a decision creates a bad precedent which could pave the way for future situations involving possible public waste and incompetence" where an agency can ignore its own regulations, and then be accountable to no one. *Peoples Gas, Light & Coke Co.* v. *U.S. Postal Service*, 658 F.2d 1182, 1202 and 1205 (7th Cir. 1981) (Campbell, J., dissenting).

"The Court's approach does too little to guard against the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits. The Court's approach must trouble all concerned with the function of the judicial process in today's world." *Id.* at 178."

B. Lower Courts and Litigants Need Guidance As To The Proper Scope And Application Of The "Zone" Test.

This Court has an obligation to the lower courts and to litigants to declare unequivocally whether the "zone" test is extinct; or, if it is still the law, what are its contours and to what type of cases is it to be applied. K. Davis *Administrative Law Treatise* §22.02-11, at 351 (Supp. 1982). In *Copper & Brass Fabricators* v. *Dept. of Treasury*, 679 F.2d 951 (D.C. Cir. 1982), Judge Ginsburg, concurring, made this plea for assistance:

"The absence of a cogent explanation by the Supreme Court of the purpose, scope, or proper application of the 'zone of interests' test has bred confusion and

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" See also: Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 493-96 (1974); K. Davis, *Administrative Law Treatise* §22.00-3, at 711-22 (Supp. 1970). Professor Davis argues with force that the "zone of interests" test is "(1) analytically faulty, (2) contrary to much case law the Court could not have meant to overrule, (3) cumbersome, inconvenient, and artificial, and (4) contrary to the congressional intent in the Administrative Procedure Act." *Id.* at 711-19.

Later in 1976, Professor Davis asserted that the zone test was "extinct . . . . as it should [be]." Davis, *Standing, 1976*, 72 Nw.U.L. Rev. 69, 81 (1977).

> divergent approaches among lower federal courts . . . The current uncertain and uneven declarations and applications of the 'zone' test, demonstrating the insecurity lower federal courts feel in this area, will continue until the Supreme Court speaks again, and with a clear voice." *Id.* at 954 (Ginsburg, J., concurring).

In *Control Data Corp.* v. *Baldridge*, 655 F.2d 283 (D.C. Cir. 1981), the Court attempted for the first time *in 1981* to give the "zone" test "content and form, definition and scope" in the absence of more specific guidance from this Court. *Id.*, at 289, 291. In surveying the law, the *Control Data* court noted the disparate and contradictory application which the lower courts have given to the "zone" test:

> "A survey of this law reveals, however, *more variety than uniformity among the approaches to the zone test.* Some courts, reacting strongly to the Supreme Court's vague formulation of the test, have expressed disagreement with the standard[16], clearly misapplied it[17], or virtually ignored it.[18]" (Emphasis added).

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[16] See, *e.g.*, *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972). In this case the court recorded its "preference for simplifying the 'law on standing.' We think that all that is required for a plaintiff to have standing to sue for a constitutional or statutory violation is a showing of 'injury in fact.'" *Id.*, at 1212 n.4.

[17] See *Upper Pecos Ass'n.* v. *Stans*, 452 F.2d 1233, 1235 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021, 93 S.Ct. 458, 34 L.Ed. 2d 313 (1972), and *Izaak Walton League of America* v. *St. Clair*, 313 F. Supp. 1312, 1316-17 (D. Minn. 1970). See also *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir.), *cert. denied*, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed. 2d 473 (1973).

[18] See, *e.g.*, *Florida* v. *Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974) (grant of standing to the state plaintiff

Both litigants and the lower federal courts *need* this Court's guidance and clarification. To remain silent on the proper application and scope of the "zone" test will only perpetuate the confusion that exists, and lead to additional cases which foreclose judicial review of agency action which is detrimental to the general health, safety or welfare."

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[19] (Continued)

solely on the basis of its "clear interest . . . in the manner in which the Medicaid program is administered vis-a-vis its citizens and in being spared the reconstitution of its statutory program. . ."), *William F. Wilke, Inc.* v. *Department of Army of United States*, 485 F.2d 180 (4th Cir. 1973) (grant of standing to a disappointed bidder for a government contract without mentioning the zone standard).

[19] An argument closely-related to the issue of general health, safety or welfare, is that Congress did not intend that the "zone" test be applied to a statutory review case under the OSHA Act. "Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one who otherwise would be barred by prudential standing rules." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100 citing *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

Congressional intent under the Act is clearly to create in Section 6(f) a broad right of pre-enforcement judicial review of an OSHA safety standard, at least where such standard is set *too low* (*i.e.*, inadequate employee protection). Where a safety standard is set too low, once the 60 day period for judicial review has expired the standard is *immune from any judicial review*. This is such a case.

This is not necessarily the result where the safety standard is set *too high*. Here an employer who fails to achieve the standard may challenge its validity during a subsequent OSHA enforcement proceeding as being set too high. This challenge can be made long after 60

II. The Decision Of The Court Below Conflicts With The Law Of This Court Concerning The Proper Application Of The "Zone Of Interests" Test.

The Court below ruled that petitioners "met the threshold requirements of injury-in-fact," the first part of the two-part test in *Data Processing*, based on our interest in the sale of fire-fighting equipment. (See "Second Interest," *infra*.). This then brought the Court to apply the zone of interests test.

In this case "the interest sought to be protected by the complainant" can be summarized as follows:

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[19] (Continued)

day limit has expired. *Marshall* v. *Union Oil Co. of California*, 616 F.2d 1113, 1117 (9th Cir. 1980).

On the other hand, a standard that is set too low will *never* be challenged as such during an enforcement proceeding by an employer who fell below the standard. The employer's only argument in defense is that the standard should be even lower, not higher.

Petitioners agree with the Court below that the "paramount purpose of the Act is to provide the Nation's employees with a safe place to work." (App. A, *infra*, p. 4a, n. 4). This being established, Section 6(f) cannot, consistent with the Act, be interpreted to deny standing to a petitioner injured-in-fact who at the pre-enforcement stage challenges a safety standard as one set too low—realistically, this is the *only* opportunity to question the validity of an inadequate standard. Standing to the broadest extent permitted by Article III is what Congress clearly intended as a check on safety standards of wide application in our Nation and of tremendous importance to employee safety.

First Interest - Petitioners' interest in OSHA standards that adequately protect employees in event of workplace fires. (App. A, *infra*, 2a)

Second Interest - Petitioners' interest in the sale of fire-fighting equipment. (App. A, *infra*, 2a)

Third Interest - Petitioner FEMA's interest in promoting workplace fire safety and the development of standards that provide adequate fire protection. (App. A, *infra*, 5a)

Each interest asserted by petitioners must be examined to determine:

> ". . . whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service* v. *Camp*, 397 U.S. at 153.

We submit that the Court below erred in ruling: (A) that the First Interest, clearly within the zone of interests to be protected by the Act, could not be asserted by petitioners; and (B) that the Third Interest is not *arguably* within the zone of interests to be protected by the Act.

A. The Court Below Erred In Ruling That Petitioners, Having Been Injured-In-Fact, Could Not Then Assert Their Interest In Adequate Workplace Fire Safety Standards.

The Court below ruled that the First Interest is without question within the zone of interests to be protected

by the Act.[20] However, petitioners were barred from asserting it because the Court below did not believe "that manufacturers or trade associations are the most effective advocate of employee interests." [21]

To bar our assertion of the First Interest, the Court below relies erroneously on a phrase from *Warth* v. *Seldin*, 422 U.S. at 499:

> ". . . the plaintiff *generally* must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*, 422 U.S. at 499 (Emphasis added).

and fails to consider the reason for applying the rule:

> "Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance. . ." *Id.*, 422 U.S. at 500.

This case does not involve any "abstract questions of wide public significance" necessitating the application of the prudential limitation stated in *Warth*. Nor does the "zone" test itself require that "the interest sought to

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[20] "It cannot be disputed that the interests the Act seeks to protect are the interests of employees in securing safe working conditions." (App. A, *infra*, 4a).

[21] Whether "most effective" or not, petitioners are the *only* advocates that can challenge the OSHA fire regulations. Judicial review is now barred by 29 U.S.C. §655(f), which requires a review petition be filed in the Court of Appeals within 60 days following promulgation of a regulation. This period expired on November 11, 1980 for the regulation at issue herein.

Moreover, a person that is financially injured by agency action can be expected to vigorously challenge such action, and may be the only person having a sufficient stake in the outcome to seek judicial review. *E.g.*, *FCC* v. *Sanders Radio Station*, 309 U.S. 470, 477 (1940).

be protected by the complainant" be an interest *personal* to the complainant; the test only requires that the asserted interest be arguably within the zone of interests to be protected or regulated by the statute. Finally, this Court has recognized the right of a person injured-in-fact to then assert the rights and interests of others where specific, concrete questions are presented.[22]

Petitioners, injured-in-fact by the agency action, do have "such a personal stake in the outcome of the controversy as to assure" the concrete adverseness required to assert the First Interest. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). It was error to rule otherwise.

B. The Court Below Erred In Ruling That FEMA's Organizational Interest In Adequate Workplace Fire Safety Standards Was Not Arguably With The "Zone Of Interests" To Be Protected By The Act.

One of petitioner-FEMA's organizational purposes is to promote workplace fire safety by urging adoption of

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[22] Professor Davis writes that the *Warth* passage on third party rights and interests is contrary to prevailing law. "In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), physicians who asserted no interest of their own were allowed standing to assert constitutional rights of patients. A school challenged a statute by asserting constitutional rights of parents and children. Pierce v. Society of Sisters, 268 U.S. 510 (1925). A seller of contraceptives may challenge a regulatory statute by asserting constitutional rights of purchasers. Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services International, 431 U.S. 678 (1977). So may a seller of beer. Craig v. Boren, 429 U.S. 190 (1976)." *Administrative Law Treatise*, §22.10-2, at 365 (Supp. 1982); see *also*: Davis, *Administrative Law Treatise* §§22.05-22.07 (1958).

adequate fire protection standards. (App. A, *infra*, 5a). In pursuit of this purpose, FEMA commenced this action against OSHA, challenging the agency's amended regulations as inadequate workplace fire protection standards. This is the Third Interest "sought to be protected by the complainant."

The Court below noted that "FEMA's objectives may be consistent with the goals of the Act, but this does not entitle them to standing." (App. A, *infra*, 5a). This conclusion is based on the following sparse, and defective, reasoning:

> "Section 6(f) of the Act was not intended to provide trade associations with a forum for expounding their views on what is required to maximize employee safety. Preserving the right of a trade association to promote their objectives [which, in FEMA's case, are *consistent with* the goals of the Act] is not an interest within the zone protected by the Act." (App. A, *infra*, 5a).

This ruling was an error of law. We believe FEMA's purpose and interest in promoting workplace fire protection by urging adoption of adequate fire protection standards *is* "arguably within the zone of interests to be protected" by the Act.

The legislative history for Section 6(f) of the Act clearly reflects a conscious choice by Congress to *grant*, not deny, associations a broad right to obtain judicial review of OSHA standards.[23]

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[23] In enacting section 6(f) of the Act, Congress purposely chose to give a broad opportunity for judicial review of OSHA standards. Senator Williams, the sponsor of S.2193 which ultimately became the OSHA Act, explained the legislative intent:

Moreover, the proper focus of the "zone" test is on the *interest* sought to be protected, not on the person asserting it. *Control Data Corp.* v. *Baldridge, supra,* at 293-294 and n.19. A review of the Act shows an undeniable interest in the promulgation of sound OSHA safety and health standards—the same interest which FEMA asserts in the present suit. The Court must examine the language of the relevant statutory provisions, pertinent regulations and the legislative history "to discern the paramenters of the relevant zone of interest to be protected or regulated and to determine whether the interest of [FEMA] arguably falls within the zone." *Peoples Gas, Light & Coke Co.* v. *U.S. Postal Service,* 658 F.2d at 1195.

We think FEMA's interest is without question within the "zone of interests" to be protected by the Act. The Act, like FEMA, expresses an interest in and concern for sound OSHA standards.[21] To protect this interest

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[22] (Continued)

> "This [section 6(f)] is a very broad-scaled judicial review *protection* that completely meets any industry concerns regarding the ability to contest the standards in court." 116 Cong. *Rec.* 37340, Nov. 16, 1970 (Emphasis added).

The breadth of section 6(f) (as opposed to a narrower provision in S.4404 which was rejected) was necessary, according to Senator Williams, to help alleviate this problem: ". . . *trade associations* and the giant corporations, having an abundance of legal manpower, would monopolize the right of review and thereby deny small employers and companies their day in court." *Id.,* at 37340. (Emphasis added).

[21] The Act authorizes OSHA to promulgate occupational safety and health standards that are "reasonably necessary or appropriate to provide safe or healthful

in sound standards, Congress included, to again quote the Act's sponsor, the "judicial review *protection*" found in Section 6(f) of the Act. 116 *Cong. Rec.* 37340, Nov. 16, 1970 (Emphasis added).

The interest in sound OSHA standards is one FEMA asserts and is within the zone of interests to be protected by the Act. The Court below erred in ruling to the contrary.

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[24] (Continued)

employment and places of employment." 29 U.S.C. §§651(b)(3), 652(8). These standards are the cornerstone of the Act, providing a means of measuring, and thus assuring, workplace safety compliance.

Congress exhibits a great concern that OSHA adopt valid safety standards for the Nation's 62 million workers in 6 million workplaces. Section 6 indicates a congressional desire that OSHA listen to the experts in the private sector who have the broad view and expertise needed to develop sound safety standards. 29 U.S.C. §655. Thus, the initial safety standards promulgated by OSHA had to be national consensus safety standards or established Federal standards. 29 U.S.C. §655(a). When OSHA proposes any change to these initial safety standards, the proposal is subjected to a rigorous notice and public comment rulemaking process; any change must be justified by substantial evidence; and any change may not deviate from private-sector national consensus safety standards unless the deviation would better effectuate the purposes of the Act. 29 U.S.C. §655(b).

To assure that OSHA discharges these important standard-setting obligations Congress provided for oversight of OSHA's conduct, through judicial review of any standard promulgated, by a *broad* scope of petitioners, but within a *limited* period of time. 29 U.S.C. §655(f). With this mechanism Congress sought to achieve crisp judicial scrutiny by those persons suffering an injury-in-fact and possessing a personal stake in the outcome of the controversy.

CONCLUSION

The lower federal courts have issued conflicting interpretations on the class of cases and circumstances in which this Court requires application of the "zone of interests" test to determine standing to sue. This Court has never applied the "zone" test to foreclose judicial review of agency action which is arguably detrimental to the geneal health, safety or welfare at the instance of a person injured-in-fact. The petition for a writ of certiorari should be granted to give the lower federal courts the guidance they have requested on this basic issue, and to preserve judicial review as a necessary check on health and safety-related government action.

Respectfully submitted,

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